Supreme Court, U.S.
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In The

Supreme Court of the United States

LOUIS RAMIREZ III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 5-Justice opinion of the Honorable John Paul Stevens in *United States v. Booker*, 543 U.S. 220 (2005), prevents a United States District Court from applying the 5-Justice opinion of the Honorable Stephen Breyer in *United States v. Booker* to conclude that the doctrine of *Blakely v. Washington*, 542 U.S. 296 (2004) need not be applied in a federal criminal case because the United States Sentencing Guidelines are no longer mandatory but are only advisory?

2. Whether money obtained in a fraudulent conspiracy that has elevated and has been used to determine a federal sentence, and where that magnitude of the money was not a count in a federal indictment and thus was not presented to a jury and found true beyond a reasonable doubt can escape the rule of *Blakely v. Washington*, 542 U.S. 296 (2004) and the 5-Justice opinion of the Hon. John Paul Stevens in *United States v. Booker,* 543 U.S. 220 (2005) by terming it "restitution" and concluding "restitution" is not subject to the *Blakely-Booker* rule?

3. Whether the dual 5-Justice opinions in *United States v. Booker*, 543 U.S. 220 (2005) can only be compatible if the rule of *Blakely v. Washington,* 542 U.S. 296 (2004) is not subject to a U.S. District Court ignoring it under the ruling that the United States Sentencing Guidelines are only advisory and not mandatory?

4. Whether this Court should grant Certiorari to amplify and make clear the consequences of error under *Blakely v. Washington,* 542 U.S. 296 (2004) in the United States Sentencing Guidelines?

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AN EXAMINATION OF 3 OPINIONS BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHEN JUXTAPOSED ON THE DECISIONS OF THIS HONORABLE COURT IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) AND THE DUAL 5-JUSTICE OPINIONS IN *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005) SERVES TO ILLUSTRATE THE NEED FOR A GRANT OF CERTIORARI TO RESOLVE WHETHER U.S. DISTRICT COURTS CAN IGNORE AN ERROR UNDER *BLAKELY V. WASHINGTON* THAT HAS CAUSED A GREATLY ELEVATED FEDERAL SENTENCE UNDER A THEORY THAT THE NOW ONLY ADVISORY AND NOT MANDATORY U.S.S.G. PERMIT A FEDERAL JUDGE TO, APPARENTLY, RE-SENTENCE AS HE/SHE WISHES IGNORING THE ERROR UNDER *BLAKELY V. WASHINGTON*. PETITIONER ASSERTS THAT A *BLAKELY* ERROR CANNOT BE

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PETITION FOR WRIT OF CERTIORARI

To the Honorable John Roberts, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner Louis Ramirez III seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the Memorandum filed October 18, 2006, which affirmed a refusal to alter a federal sentence by the United States District Court for the Central District of California on the sole grounds that an order of "restitution" of money acquired in a federal conspiracy is not subject to the rules of *Blakely v. Washington*, 542 U.S. 296 (2004) and the 5-Justice opinion of the Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220 (2005).

OPINIONS BELOW

The United States District Court for the Central District of California refused to alter a pre-*Blakely*-pre-*Booker* sentence on October 3, 2005 concluding that the rule of *Blakely v. Washington*, 542 U.S. 296 (2004) need not be applied in a federal re-sentence.

That order is set forth as Appendix "B" to this petition.

Appeal was taken by petitioner Louis Ramirez III to the United States Court of Appeals for the Ninth Circuit and that Court affirmed on October 18, 2006. A copy of that unpublished Memorandum appears as Appendix "A" to this Petition.

The litigation in this case involved a federal indictment charging of but 6 counts of fraud against petitioner Ramirez, and following conviction thereon, the United States Probation/Pre-sentence offices compiling an extensive list of monetary sums allegedly stolen by others in a conspiracy, but never specifically charged, and never submitted to the trial jury, and thus never found to be true beyond a reasonable doubt, and used to greatly elevate the sentence under U.S.S.G.

Following the 5-Justice opinion of the Honorable Stephen Breyer in *United States v. Booker,* 543 U.S. 220 (2005), and the En Banc ruling of the U.S. 9th Circuit in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005 En Banc), a remand was made to the U.S. District Court to determine whether the District Court would alter the sentence.

JURISDICTIONAL GROUNDS

(i) The United States District Court refused to alter the initial federal sentence imposed on petitioner on October 3, 2005. (Appendix "B")

(ii) Appeal was taken by this petitioner to the United States Court of Appeals for the Ninth Circuit and the Circuit affirmed the U.S. District Court judgment on October 18, 2006. (Appendix "A")

(iii) Jurisdiction to review by certiorari a decision of a United States Circuit Court in a federal appeal of a criminal conviction is provided under 28 U.S.C. § 1254.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 1999, a federal indictment was returned in the Central District of California charging petitioner Louis Ramirez III with 6 specific counts of 18 U.S.C. §§ 2; 1341; 1343; 2326 as a member of a conspiracy running a telemarketing sales of exclusive rights to territories to becoming billing services for physicians and dentists in the particular state that respondents to the calls were then living.

Essentially, a purchaser of the telemarketing offer would receive a list of physicians and dentists in their home state that were seeking parties to do their formal billing of patients, thus totally relieving the professional of money collections for medical or dental services rendered by that practitioner.

In fact, and in truth, the purchaser of the telemarketing offer received a computer disk containing the names,

addresses, and phone numbers of all registered physicians or dentists in the state of residence of that purchaser.

In fact, none of the names on the disk had been surveyed to see if they desired to hire billing services, and generally said when the purchaser called any name on the disk, the professional office receiving the call responded by stating that they desired no billing services, and had never even heard of the organization that supplied the computer disk. In fact, the disk had been obtained, in each state, by calling the state licensing bureau for either physicians or dentists and then compiling that list; the selling organization had not first called physicians or dentists to cull from the totality of practitioners' names of professional offices only the names of those desiring billing services.

Petitioner Ramirez III and a co-defendant, one Marcel Travers were the only defendants that went to a jury trial, petitioner being charged only with 6 specific victims of the scheme that he, Ramirez III, had telephonically contacted and had sold a computer disk to; no separate count of the indictment charged an overall monetary fraud amount, and no such amount was submitted to the jury, and thus was never found to be true beyond a reasonable doubt.

After conviction, the United States Probation and Presentence office compiled a list of allegedly all of the victims, although admittedly some of these alleged victims had been reimbursed by the operators.

Importantly, the Government could not readily discern whether any given name on the alleged victim list had been reimbursed or not, but did conclude that some $2,123,519.10 had been fraudulently obtained in the overall conspiracy.

Due to uncertainties, this list was diminished by an estimated percentage, and petitioner was alleged to have been responsible for $1,741,285.66 in theft, an amount in excess of the $1,500,000 in the United States Sentencing Guidelines ("U.S.S.G."), and which amount greatly elevated his sentence to level 22, U.S.S.G., and he was sentenced to 41 months by the District Court.

Appeal was taken to the U.S. 9th Circuit, and while this appeal was pending, this Honorable Court rendered 2 decisions that did govern the appeal, and now govern the issues in this Petition for Certiorari, *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

It is the juxtaposition of *Blakely v. Washington*, 542 U.S. 296 (2004) on the dual 5-Justice opinions in *United States v. Booker*, 543 U.S. 220 (2005) and the interpretation of *United States v. Booker* by 3 successive opinions of the United States Court of Appeals for the Ninth Circuit, *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005) and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005 En Banc) that serve as the basis for this Petition for Writ of Certiorari.

Petitioner charts the ever-evolving 9th Circuit treatment of *Blakely v. Washington,* (2004) by the 9th Circuit 3-Judge Panels, and finally by the En Banc panel, the latter of which seemed to render opaque and non-directive the requirements of U.S. District Courts within the 9th Circuit as to guidelines to apply the errors existing in a case wrought by the mandate of *Blakely v. Washington*, 542 U.S. 296 (2004).

The 9th Circuit position in its En Banc ruling in *Ameline III* was to remand the case to the District Court,

allowing the District Court to do what it wished, not directing the application of *Blakely v. Washington* to any re-sentencing.

In Exhibit "B" to this petition, the District Judge set forth positions of both the government and petitioner, and ignored the *Blakely*-mandate, and ruled on October 3, 2005 that the sentence would not be altered.

REASONS FOR GRANTING CERTIORARI

1. To resolve in a specific opinion whether the command of *Blakely v. Washington*, 542 U.S. 296 (2004) can be eschewed or obviated in application to a federal sentence in view of the 5-Justice opinion of Justice John Paul Stevens in *United States v. Booker*, 543 U.S. 220 (2005) solely on the basis of the 5-Justice opinion in *United States v. Booker* by the Honorable Stephen Breyer that United States Sentencing Guidelines are no longer mandatory but only advisory.

2. To resolve how the dual 5-Justice opinions in *United States v. Booker*, 543 U.S. 220 (2005) can be at all compatible unless this court now elucidates that while the U.S.S.G. are now only "advisory," that mandatory liberation does not permit a federal sentencing court to ignore an obvious error under *Blakely v. Washington*, 542 U.S. 296 (2004), and therefore is not free to adhere to a previous elevated sentence that resulted from a failure to indict upon, and submit to a jury for determination beyond a reasonable doubt, the set of facts that caused elevation of the original sentence.

ARGUMENT I

AN EXAMINATION OF 3 OPINIONS BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHEN JUXTAPOSED ON THE DECISIONS OF THIS HONORABLE COURT IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) AND THE DUAL 5-JUSTICE OPINIONS IN *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005) SERVES TO ILLUSTRATE THE NEED FOR A GRANT OF CERTIORARI TO RESOLVE WHETHER U.S. DISTRICT COURTS CAN IGNORE AN ERROR UNDER *BLAKELY V. WASHINGTON* THAT HAS CAUSED A GREATLY ELEVATED FEDERAL SENTENCE UNDER A THEORY THAT THE NOW ONLY ADVISORY AND NOT MANDATORY U.S.S.G. PERMIT A FEDERAL JUDGE TO, APPARENTLY, RE-SENTENCE AS HE/SHE WISHES IGNORING THE ERROR UNDER *BLAKELY V. WASHINGTON*. PETITIONER ASSERTS THAT A *BLAKELY* ERROR CANNOT BE EXCUSED AND CIRCUMVENTED UNDER A BELIEF THAT THE U.S.S.G. NOW DO NOT COMPEL THE CORRECTION OF SUCH AN ERROR, AND CERTIORARI SHOULD BE GRANTED TO ILLUMINATE AND RESOLVE THIS EVER REOCCURRING ISSUE.

On June 24, 2004, this Honorable Court handed down the decision *Blakely v. Washington*, 542 U.S. 296 (2004) which held, in key relevant areas, that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was to be applied to sentences imposed for state convictions, i.e., "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Petitioner Louis Ramirez III was convicted in U.S. District Court on October 10, 2002 and was sentenced to an elevated term of 41 months in federal prison where the elevation was caused by a post-trial compilation of asserted monetary fraud NOT THE SUBJECT OF ANY COUNT OF THE FEDERAL INDICTMENT, AND THUS NEVER SUBMITTED TO THE JURY AND FOUND TO BE TRUE BEYOND A REASONABLE DOUBT. This original sentence was imposed on March 17, 2003.

Appeal was taken to the U.S. Court of Appeals for the 9th Circuit, who affirmed the conviction on September 27, 2004 but specifically remanded to the United States District Court, Central District of California to re-sentence in conformance with *Blakely v. Washington*, 542 U.S. 296 (2004).

That specific order is noted by the District Court in Exhibit "B."

On July 21, 2004, in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) ("*Ameline I*"), a 3-judge panel, applying *Blakely v. Washington*, 542 U.S. 296 (2004) to the U.S.S.G. held at 376 F.3d 967, 974 (footnotes omitted in printing):

> B. *Does the Sixth Amendment Right Announced in Blakely Apply to Sentences Imposed Under the United States Sentencing Guidelines?*
>
> [2] We join the Seventh Circuit in holding that there is no principled distinction between the Washington Sentencing Reform Act[3] at issue in *Blakely* and the United States Sentencing Guidelines. *Booker*, 2004 WL 1535858, at *3.

> While the *Blakely* court only addressed the Washington State sentencing scheme,[4] the manner in which the majority defined the "statutory maximum" compels us to conclude that its reasoning applies with equal force to the Sentencing Guidelines.

And at 376 F.3d 967, 980:

> [8,9] We have held that *Blakely* applies to the procedure the district court followed to determine Ameline's base offense level under § 2D1.1(c) and the two level upward enhancement pursuant to § 2D1.1(b)(1). We do not invalidate either the base offense levels in § 2D1.1(c) or the two level enhancement in § 2D1.1(b)(1). Rather, we hold that in determining a base offense level under § 2D1.1(c) or an upward enhancement under § 2D1.1(b)(1), in order to be consistent with *Blakely*, those determinations must be made by a jury beyond a reasonable doubt (or by a judge with proper jury waiver).

And finally at 376 F.3d 967, 983 (footnotes omitted in printing):

> Because we conclude that Ameline has the right to have a jury decide the facts underlying the determination of his base offense level and his two level firearm enhancement beyond a reasonable doubt, we must reverse the district court's judgment and remand for resentencing. Should the government abandon its attempt to hold Ameline responsible for 1,603.60 grams of methamphetamine, the maximum sentence the district court could impose on Ameline at resentencing could solely be based on his admissions.[18]
>
> [16] However, should the government seek to obtain a higher sentence for the offense of conviction, the district court may convene a sentencing

> jury to try the drug quantity and firearm issues, which, if proven beyond a reasonable doubt, may be used to increase Ameline's sentence.[19] As the Seventh Circuit in *Booker* noted, federal courts have long employed bifurcated juries in the capital punishment context, as well as in the civil context where a jury may only determine damages once it has separately determined liability. "There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial." 375 F.3d 508, 514, 2004 WL 1535858, at *5; *see also United States v. Khan*, 2004 U.S. Dist. LEXIS 13192 at *16 (E.D.N.Y. July 12, 2004) (noting the success of the bifurcated jury system in capital cases).[20]

Then, on February 10, 2005, in *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005) ("*Ameline II*"), this same 3-judge panel ruled, in their consideration of the consequences of *United States v. Booker*, 543 U.S. 220 (2005) in key areas as follows:

At 400 F.3d 646, 649:

> In light of the Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), we granted appellant Alfred Ameline's petition for rehearing to reconsider our decision in *United States v. Ameline*, 376 F.3d 967 (9th Cir.2004). In our original opinion, we held that, because Ameline's sentence under the United States Sentencing Guidelines was based on facts found by the district judge by a preponderance of the evidence, his sentence violated the Sixth Amendment as construed by the Supreme Court in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We vacated Ameline's sentence and remanded for

> resentencing with directions that, if necessary, a jury determine the amount of drugs attributable to Ameline and whether he possessed a weapon in connection with his conviction, two factors that could enhance his sentence under the Sentencing Guidelines.

And at 400 F.3d 646, 649-650:

> Our original opinion was consistent with *Booker*'s holding that the Sixth Amendment as construed in *Blakely* applies to the Sentencing Guidelines. It was at odds, however, with the Court's severability remedy that eliminated the mandatory nature of the Sentencing Guidelines. Applying *Booker* to the present case, we conclude that (1) the Court's holding in *Booker* applies to all criminal cases pending on direct appeal at the time it was rendered; (2) because Ameline did not raise a Sixth Amendment argument at the time of sentencing we review for plain error; (3) Ameline's sentence violated the Sixth Amendment and constituted plain error; and (4) the error seriously affected the fairness of Ameline's proceedings. Accordingly, we vacate Ameline's sentence and remand for resentencing.

Thereafter, the 9th Circuit granted an En Banc hearing, resulting in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005 En Banc), and an examination of this decision leaves no consideration to the commands of *Blakely v. Washington*, 542 U.S. 296 (2004), and, apparently, concludes that since the holding that the U.S.S.G. are now only "advisory," and not mandatory, the 9th Circuit will leave to District Judges on remand the unfettered decision whether to alter the sentence that will be imposed. There was no overt ruling that the rule of *Blakely* need be applied, and as a result, the instant court

ignored its command which should have been applied pursuant to the 5-Justice opinion of the Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220 (2005).

Petitioner here asserts that such discretion to alter or not alter may well be satisfactory if no error exists in the sentence under *Blakely v. Washington*, but if *Blakely* error is demonstrated, as at bar in petitioner Ramirez's case, the Court must restrict the sentence to only those facts submitted to the jury and found true beyond a reasonable doubt.

The District Court is not free to ignore, circumvent, or eschew clear *Blakely* error under a theory that it can do so since the U.S.S.G. are now only "advisory" and not mandatory, for in so doing, the District Court totally obliterates the 5-Justice opinion of the Honorable John Paul Stevens that *Blakely v. Washington*, 542 U.S. 296 (2004) fully applies to the U.S.S.G.

It appears to be plain and true without contradiction that U.S. District Courts in the 9th Circuit can now ignore the 5-Justice opinion of the Hon. John Paul Stevens in *United States v. Booker*, 543 U.S. 220 (2005), thus raising the question of how that can be allowed by mere statements that the U.S.S.G. are only "advisory". If the latter is the answer, there would appear to have been no reason for the 5-Justice opinion of Justice Stevens.

An issue of surely circuit-wide importance, if not national consequence, depending on interpretation of *Booker* by other U.S. Circuits, other U.S. Circuits and District Courts therein, Certiorari to the U.S. 9th Circuit should be granted.

ARGUMENT II

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT TERMING AN AMOUNT OF MONEY FRAUDULENTLY TAKEN IN A FEDERAL CONSPIRACY AS "RESTITUTION" OBVIATES THE REQUIREMENT OF *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) AND *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005) (5-JUSTICE OPINION BY HON. JOHN PAUL STEVENS) THAT SAID AMOUNT HAD TO BE SUBMITTED TO A JURY AND FOUND TRUE BEYOND A REASONABLE DOUBT.

The U.S. Court of Appeals affirmed petitioner Ramirez's sentence in a terse unpublished Memorandum holding that an order of *RESTITUTION* is not subject to the *Apprendi-Blakely-Booker* requirement that said amount, which caused the elevated sentence, need not be submitted to a jury and found true beyond a reasonable doubt. That Memorandum Order of Affirmance is set forth as Appendix "A" to this petition.

It is based on the non-stated use of a pre-*Blakely*, pre-*Booker* circuit decision of *United States v. Baker*, 25 F.3d 1452, 1456 (9th Cir. 1994) which obviously did not confront the above Sixth Amendment issue, and that decision was then used in *United States v. De George*, 380 F.3d 1203, 1221 (9th Cir. 2004) to circumvent the need to apply *Blakely-Booker*.

Finally, the decision of the Ninth Circuit in Appendix "A" applying *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005), asserting "restitution orders are unaffected by the Supreme Court's decision in *United States v. Booker*,

543 U.S. 220 (2005)" is the basis for grant of Certiorari, for it must be remembered that the order of restitution was based directly upon the amount of the alleged theft, which was not the subject of any charge in the indictment, and which was, therefore, never submitted to the jury and found true beyond a reasonable doubt.

CONCLUSION

An issue of national importance having here been raised concerning the requirement that *Blakely v. Washington*, 542 U.S. 296 (2004) be applied to the U.S.S.G. as set forth in *United States v. Booker*, 543 U.S. 220 (2005), and such not being applied under a renaming the amount of theft as "restitution," Certiorari should be granted to the U.S. Court of Appeals for the Ninth Circuit.

Dated: January 12, 2007

Respectfully submitted,

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Supreme Court of the United States

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS RAMIREZ, III, aka Seal F, Defendant-Appellant.	No. 05-50825 D.C. No. CR-99-00158-AHS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted October 16, 2006**

(Filed Oct. 18, 2006)

Before: T.G. NELSON, W. FLETCHER and RAWLINSON, Circuit Judges.

Louis Ramirez, III, appeals from the restitution order imposed following his conviction for mail and wire fraud, in violation of 18 U.S.C. §§ 2, 1341, 1343 and 2326. We

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Ramirez contends that the district court violated his Sixth Amendment rights by ordering restitution in an amount that exceeded what was supported by the jury's verdict. This contention is foreclosed by *United States v. Bussell,* 414 F.3d 1048, 1060 (9th Cir. 2005) (restitution orders are unaffected by the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005)).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

THE HONORABLE ALICEMARIE H. STOTLER, CHIEF JUDGE, PRESIDING

TENTATIVE RULING ON SENTENCING

October 3, 2005 Calendar No. 6

CASE: ***United States v. America v. Louis Ramirez III***
SA CR 99-158 AHS

PROCEEDING: Sentencing After Remand by Ninth Circuit

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1. Procedural Background

On October 10, 2002, a jury convicted defendant Louis Ramirez of Six Counts charging violations of 18 U.S.C. §§ 1341, 1343. On March 17, 2003, the Court sentenced defendant to 41 months imprisonment.

Defendant appealed his conviction and sentence in the Ninth Circuit Court of Appeals. By memorandum dated September 27, 2004, the Ninth Circuit affirmed defendant's conviction but remanded for "reconsideration of appellants' sentences in light of *Blakely*." *United States v. Ramirez*, No. 03-50131, amended mem. at 16 (9th Cir. Sept. 27, 2004). Specifically, the Ninth Circuit ruled that the Court must reconsider, "as if the slate had been wiped clean," defendant's 12-level sentencing enhancement based on loss sustained by victims of the offense. *Id.* at 14.

The Court held a status conference on April 18, 2005, and ordered the parties to file position papers. On April

29, 2005, defendant filed an opening brief on re-sentencing. The government filed its position on re-sentencing on May 2, 2005. On May 16, 2005, defendant filed his response to the government's position. The government filed its response thereto on May 16, 2005. On May 20, 2005, defendant filed a traverse/response to the government's position and response to the PSR. The government filed a reply thereto on May 23, 2005.

The Court originally set the sentencing hearing for June 20, 2005, but continued it to August 8, 2005 and again to October 3, 2005, for the purpose of receiving a supplemental Presentence Investigation Report ("PSR").

On August 31, 2005, the Probation Office disclosed the PSR. Defendant filed his opposition to the PSR on September 7, 2005. The government filed its position and response to the PSR on September 9, 2005. Defendant filed his response to the government's position on September 22, 2005. Defendant has not had thirty-five days to review the PSR as required by Federal Rules of Criminal Procedure 32(e), and he must waive that right in order to proceed to sentencing today as scheduled.

2. Factual Objections to the PSR

There being no objections to the factual statements contained in the PSR, the Court adopts those statements as its findings of fact.

3. <u>Objections to the Sentencing Guideline Calculation</u>:

a. Probation's Calculation:

Probation's Guideline calculation is based on the Guidelines in effect on the date of the offense, the November 1, 1998 edition, because of an ex post facto issue. Section 2F1.1(a) suggests a base offense level of 6. Pursuant to § 1B1.3(a) and Application Note 2, defendant is responsible for his own behavior as well as the actions of others committed in furtherance of jointly undertaken criminal activity.

Defendant was engaged in an [sic] jointly undertaken criminal activity to sell Medco Software to victims, and, in furtherance of the scheme, he and others would pose as satisfied customers and refer prospective customers to a telephone number that falsely informed them Medco was legitimate. Based on this behavior, defendant is responsible for the losses to all victims of the Medco scheme during his tenure there. During his tenure, victims sustained losses of approximately $2,123,519.10. Pursuant to § 2F1.1(b)(1)(M), a 12-level enhancement should be applied.

Further, a 2-level enhancement should apply because the offense involved more than minimal planning or a scheme to defraud more than one victim. § 2F1.1(b)(2). Another 2-level enhancement should apply because the offense was committed through mass marketing. § 2F1.1(b)(3). Thus, defendant's total offense level is 22.

b. Defendant's Position:

The Court should reject the PSR's sentence calculation because it imposes a 12-level enhancement for $2,123,519.10 in losses allegedly sustained by victims. The Ninth Circuit remanded defendant's case for re-sentencing "[i]n light of *Blakely*." *United States v. Ramirez*, No. 03-50131, amended mem. at 16 (9th Cir. Sept. 27, 2004). Thus, the Ninth Circuit has specifically ordered that *Blakely* be controlling in this re-sentencing. Under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the facts on which a sentencing enhancement is based must be admitted by defendant or found by a jury to be true beyond a reasonable doubt. Otherwise, the sentencing court has violated defendant's Sixth Amendment right. *Id.*; *see also United States v. Ameline*, 376 F.3d 967, 979 (9th Cir. 2004) ("*Ameline I*"). The plain error analysis announced in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc) ("*Ameline III*"), requires the Court to find prejudice because defendant was denied a jury to find the alleged money loss to victims. The denial of a jury was plain error that requires nullification of the old sentence and imposition of a sentence limited to what was actually submitted to and found by the jury. The Court cannot engage in key monetary loss calculations, which were not submitted to the jury, to enhance defendant's sentence.

United States v. Booker, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), did not change the rule that facts supporting a sentence must be admitted by a defendant or found by a jury, and in fact it embraced the earlier decisions of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, and *Blakely*, which enunciated this rule. Justice Stevens delivered the Court's *Booker* opinion in

part, with four other Justices joining him. Justice Stevens's portion of *Booker* affirmed the Sixth Amendment guarantee that a jury should find facts supporting sentencing enhancement. Justice Breyer delivered the Court's *Booker* opinion in part also, with four Justices joining him. Justice Breyer's portion rendered the Guidelines advisory, but did not abrogate the Sixth Amendment right to judicial fact-finding that Justice Stevens's portion guaranteed. In short, nothing in Justice Breyer's opinion nullifies the commands of Justice Stevens's opinion, because if it did, there would be no need for Justice Stevens's opinion.[1]

In determining a new sentence, the Court should also ignore the PSR's account that defendant disavowed guilt. *See* PSR ¶¶ 57-58. There is no requirement that defendant admit his wrongful conduct, and, indeed, it would be error for him to do so under the *Apprendi-Blakely-Booker-Ameline* line of cases.

c. Government's Position:

The Supreme Court's decision in *Booker* makes clear that factual findings required to apply sentencing enhancements can be undertaken by the Court at sentencing. Furthermore, the burden of proof on the government at sentencing remains the preponderance of the evidence standard.

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[1] Defendant raised the arguments in the above two paragraphs in response to the PSR, but he also raised them in his filings prior to disclosure of the PSR by Probation. These filings include: (1) defendant's opening brief, filed April 29, 2005; (2) defendant's response to the government's position re: re-sentencing, filed May 16, 2005; and (3) defendant's traverse to the response of the government, filed May 20, 2005.

In *Apprendi*, the Supreme Court held that any fact increasing a defendant's sentence beyond a statutory maximum, other than a prior conviction, "must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Booker*, after severing the provisions of the U.S.S.G. that made that made [sic] them mandatory, the Court reasoned that "without the provision that makes 'the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges – the statute falls outside the scope of *Apprendi*'s requirement." In so holding, the Court rejected the proposal by Justice Stevens that a constitutional jury fact-finding requirement be engrafted into the Guidelines.

Thus, the Court may itself make whatever factual determinations may be required in connection with a sentencing enhancement. At trial, the Court heard facts sufficient to support the 12-level enhancement for loss in this case. Frank Curtin, a Senior Officer for Information Technology in Litigation Support Services from the Federal Trade Commission, testified about the analysis he had conducted of Medco's computers. (5/2/05 Government's Position Re: Re-Sentencing of Defendant, McConville Decl., Ex. A.) Mr. Curtin testified that Medco made 12,654 sales totaling $4,356,668.04 between June 1998 and August 1999, and he prepared trial exhibit 44 to reflect his findings. (*See* McConville Decl., Ex. B.) He conducted similar analyses and prepared similar trial exhibits for individual telemarketers, including defendant. (*See* McConville Decl., Ex. C.) Mr. Curtin found that Ramirez had sold packages totaling $252,061.18 during his time with Medco. (McConville Decl., Exs. A, C.)

Counsel for both defendant and co-defendant Marcel Travers cross-examined Mr. Curtin at trial about his

findings. These facts regarding total sales at Medco were part of the original PSR issued on November 20, 2002. That PSR also included statements from victims, and six victims testified at trial. This record supporting the factual findings has not changed since the original sentencing, and defendant does not and cannot challenge the loss figure established through the sworn testimony of Mr. Curtin and trial exhibits.

Furthermore, the Supreme Court has held that application of the preponderance of the evidence standard at sentencing generally satisfies due process. *See United States v. Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997). Even if the Court were to require proof beyond a reasonable doubt, however, the government has carried that burden. Thus, the court should adopt the findings of the PSR, which are supported by overwhelming evidence.[2]

Finally, the Ninth Circuit has recently stated that a judge can make findings of fact to support a sentence and has expressly rejected defendant's suggested approach of accepting Justice Stevens's portion of the *Booker* opinion while rejecting Justice Breyer's portion. *See United State v. Dupas*, 419 F.3d 916, 919-20 (9th Cir. 2005).

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[2] In response to defendant's opposition to the PSR, the government directed the Court to its previously filed papers for arguments rebutting defendant's contentions, including: (1) the government's position on resentencing, filed May 2, 2005; (2) the government's response to defendant's sentencing position, filed May 16, 2005; and (3) the government's reply to defendant's traverse to response of government, filed May 23, 2005. As such, the above five paragraphs incorporate the government's arguments from these filings.

d. Defendant's Traverse/Response

The government asserts that *Dupas* literally solves all problems in federal sentencing and apparently does away with any issue in re-sentencing that is based on *Blakely*. However, *Dupas* did not involve a trial, and in fact it involved a plea of guilty with a stipulated money loss, a relatively modest sum exceeding $5,000. Thus, *Blakely* never surfaces in *Dupas*, and the waiver of a jury trial in *Dupas* would seemingly preclude the defendant in that case from demanding the impanelment of a jury to determine sentencing facts. In *Dupas*, that court could truly circumvent *Blakely* because no trial occurred, but in the instant case, where the PSR resurfaces and rubber stamps the initial PSR, it is not the case that the court can circumvent *Blakely*. The sentencing hearing should be vacated and the Court should require appearances to discuss the mystery existing because of the Stevens-Breyer dichotomy in *Booker*.

e. Court's Ruling:

Defendant argues that Justice Stevens's portion of *Booker* guarantees him a right to jury fact-finding of sentencing factors. However, "everyone agrees that the constitutional issues presented by [*Booker*] would have been avoided entirely if Congress had omitted from the SRA the provisions that makes the Guidelines binding on district judges.... For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Booker*, 125 S. Ct. at 750 (Stevens, J.), Indeed, the remedial portion of *Booker*, authored by Justice Breyer, recognized this

principle and severed the portions of the Guidelines making them mandatory.

Thus, "[s]tanding alone, judicial consideration of facts and circumstances beyond those found by a jury or admitted by the defendant does not violate the Sixth Amendment right to jury trial. A constitutional infirmity arises only when extra-verdict findings are made in a mandatory guidelines system." *Ameline III*, 409 F.3d at 1077-78; *see also Dupas*, 419 F.3d at 919.

The Court may make the necessary findings of fact to determine the appropriate Guideline range, and it may do so by a preponderance of the evidence standard. *See Watts*, 519 U.S. at 156-57; *United States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990). Here, the government provides Mr. Curtin's trial testimony and trial exhibits prepared by him as evidence of the loss suffered by victims. This is sufficient to show by a preponderance of the evidence that defendant caused loss in excess of $1.5 million, and thus the sentencing enhancement in § 2F1.1(b)(1)(M) should apply.

4. **The Recommended Sentence Under the Advisory Guidelines Is:**

Total Offense Level: 22;

Criminal History Category: I;

41 to 51 months imprisonment;

2 to 3 years supervised release, pursuant to § 5D1.2(a)(2);

$7,500 to $75,000 fine, pursuant to § 5E1.2 of the Guidelines.

5. Objections to Restitution Calculation:

a. Probation's Recommendation:

Defendant should pay restitution in the amount of $1,741,285.66. Medco attempted to defraud 12,654 victims of more than $4 million. Approximately 2,199 customers, or 18%, received a refund or some other compensation, thereby reducing the total number of victims who sustained a loss to 10,455. These victims' names and addresses were obtained from various incomplete records seized from Medco. From this record, an attorney with the Federal Trade commission was able to identify by name and address a total of 7,560 victims who sustained an actual loss of $2,628,159.64. This sum should be reduced by 18%, since 18% of the victims have already been compensated. This leaves $1,741,285.66 owing in restitution.

b. Defendant's Position:

The amount of money fraudulently attributed to defendant was not found by a jury, and as such, it cannot be used to support an order of restitution. *See United States v. Doe*, 374 F.3d 851, 854 (9th Cir. 2004). In any order of restitution, the Court must be able to specifically identify the alleged victims of the offense, *id.*, and in this case only six witnesses testified at trial. If defendant waived his right to challenge the monetary amount by stipulating to a loss amount, such a waiver is a nullity. *Id.* at 855.

Probation's and the government's use of the 18% figure to discount the restitution defendant owes demonstrates that they were unable to identify some victims and their actual losses, essentially admitting that they have

little to zero knowledge of the identity of each victim. The government has failed to provide specific victim's names.[3]

c. Government's Position:

Defendant has misread and misapplied *Doe*. In that case, the Ninth Circuit reversed that restitution order because the government had failed to identify the individual victims of the offense. The court simply reiterated its prior holdings that restitution must be limited to the amount actually lost by victims. In this case, Probation did exactly that. The PSR described how the Probation Officer determined the identities of 7,560 victims, explained the total loss sustained by these victims, and explained how and why the loss was discounted by 18%. Thus, the Court should impose the amount recommended by the PSR.[4]

d. Court's Ruling:

The Court agrees with the government's reading of the *Doe* case. *Doe* requires only that "restitution . . . must be 'limited by the amount actually lost by the victims,' and that the court 'must be able positively to identify each victim to whom restitution is due.'" *Id.* at 854 (quoting *United States v. Pomazi*, 851 F.2d 244, 250 (9th Cir. 2004)). It does not require that the facts underlying the

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[3] Defendant's arguments in this section appear in: (1) defendant's opening brief, filed April 29, 2005; (2) defendant's response to the government's position re: re-sentencing, filed May 16, 2005; (3) defendant's traverse to the response of the government, filed May 20, 2005; and (4) defendant's opposition to the PSR, filed September 7, 2005.

[4] The government's arguments in this section appear in its position on re-sentencing, filed May 2, 2005.

order of restitution be found by a jury to be true beyond a reasonable doubt.

Here, the government and Probation have provided facts showing that restitution is limited to actual victims and actual loss.

6. Probation's Recommendation:

Probation recommends 41 months imprisonment and three years supervised release.

Defendant began serving a 41-month term on July 30, 2003. After receiving good time credit and completing the Bureau of Prison's Residential Drug Treatment Program, defendant's sentence was reduced to 24 months. With six months left in custody, defendant was transferred to a community corrections center, where he remained until April 25, 2005, when he was released on bond pending re-sentencing.

7. Parties' Positions:

a. Defendant's Position:

The Court should reject the recommendations of the PSR.

b. Government's Position:

The government concurs with Probation's recommendation and believes that defendant should serve the remainder of his 41 months in a community confinement center, where he was confined until release on bond. The fact has not changed that defendant victimized hundreds of people and took from them hundreds of thousands of

dollars. This serious sentence fits the serious crime. Further, according to the PSR, defendant still denies any wrongdoing and seems determined to avoid paying restitution to victims. This sentiment should not be rewarded with leniency.

8. Statutory Considerations

Title 18 U.S.C. § 3553(a) enumerates sentencing factors the Court shall consider, including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to (A) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense, (B) afford adequate deterrence to criminal conduct, (C) protect the public from further crimes of the defendant, and (D) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and sentencing ranges established; (5) pertinent policy statements; (6) the need to avoid sentencing disparities; and (7) the need to provide restitution.

9. Court's Findings

The Court finds that a sentence corresponding to an offense level of 22 and a criminal history of I under the Guidelines is appropriate.

However, because the statutory goals of sentencing have largely been realized in this defendant's case, the Court finds that the statutory factors of section 3553(a) point to a sentence of 36 months. This sentence accounts –

for defendant's successful adjustment while in custody; defendant received his GED, graduated from a drug treatment program, and worked steadily while at the community confinement center. Also in mitigation, defendant has strong family ties and appears to be devoted to caring for his mother and youngest sister. On the other hand, this sentence reflects the seriousness of defendant's offense, serves to deter future offenses, and accounts for defendant's continued denial of responsibility.

10. In light of the Probation Office's determination that defendant does not have the present ability to pay a fine, the court waives payment of the fine pursuant to § 5E1.2(e) of the Guidelines.

11. Defendant is ordered to pay a $600 special assessment to the United States, pursuant to 18 U.S.C. § 3013.

12. Defendant is hereby advised that an appeal of the Court's judgment pronounced this day may be taken. For an appeal to be effective, defendant must file a Notice of Appeal with the Clerk of this Court not later than ten days from today's date. Failure to file a Notice of Appeal will result in there being no appellate review of the Court's judgment.

Defendant is hereby advised that if defendant is unable to hire counsel for representation on appeal, defendant may apply to the Court for appointment of counsel by submitting a financial affidavit to show that defendant is eligible for Court-appointed counsel to represent defendant on appeal.